Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MB Docket No. 04-256
Attribution of Joint Sales Agreements	)	
In Local Television Markets	)	

To: The Secretary

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

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Summary

Paxson Communications Corporation ("PCC") is the owner and/or operator of 60 full-power television stations, as well as the PaxTV Network, the nation's seventh television broadcast network. Through joint sales agreements ("JSAs") with leading broadcasters in roughly four dozen markets, PCC is likely the largest operator of television stations subject to JSAs in the country. These JSAs allow PCC to benefit from the experience, expertise, skills, contacts, and resources of the sales agents, thereby enabling the relevant PCC television stations to receive a larger share of net local advertising revenue than would be possible through PCC's own efforts. The JSAs produce enormous efficiencies in station operations that in turn enable PCC to develop new, original, family-friendly programming for the PCC television stations that otherwise simply would not be available in the marketplace. All the while, PCC retains exclusive control of the programming personnel, and finances of its television stations. These television JSAs result in demonstrable public interest benefits with little or no adverse impact on local competition and diversity.

PCC and other commenters with actual experience operating television stations will conclusively establish that television JSAs and radio JSAs, while perhaps containing similar terms and conditions, have materially different effects on their respective local markets. Mark R. Fratrick, Ph.D., Vice President of BIA Financial Network, for example, explains herein how the relatively limited number of radio formats allows for greater control of local radio markets by fewer owners, in contrast to the local television market, in which a multi-channel universe prevents a single or even a few broadcasters from dominating a particular format or demographic. BIA's analysis also confirms that many existing television JSAs, including those

in which the sales agent brokers a PCC television station, do not raise competition concerns for local television markets.

The *Notice* in this proceeding proposes a one-size-fits-all approach to television JSAs in lieu of targeted, outlet-specific ownership rules that reflect the distinctions and differences among local media. As the Commission recently concluded in its media ownership proceeding, a one-size-fits-all regulatory approach does not serve the public interest, and it should not be adopted here.

In light of the overwhelming differences between the effect of radio JSAs and television JSAs on local markets, it would be arbitrary and capricious for the Commission to simply fasten its radio JSA standard onto television JSAs. The concerns that the Commission identified in the *Notice* about a specific television JSA in a single particular case do not warrant condemnation of all television JSAs. To the contrary, the evidence in the record of this proceeding will establish that the Commission should continue to apply its current treatment of television JSAs to those arrangements that operate within the strict confines established by the Commission's decisions.

If the Commission elects to attribute television JSAs, it must be careful to adopt a targeted, outlet-specific rule reflecting the differences between radio and television. PCC therefore proposes that the Commission attribute only television JSAs that arguably might give a single party a sizeable enough share of the local advertising market to raise concerns, that is, those television JSAs where the sales agent would be selling more than 35% of all broadcast television advertising time in the DMA.

Alternatively, the Commission should consider adopting an attribution rule that targets only those television JSAs that, while perhaps remaining below the 35% market standard, nevertheless may provide a sales agent with a degree of influence or control that might have a realistic potential to affect the programming decisions of licensees or other core operating functions. In particular, should the Commission decide to attribute television JSAs, it should attribute only those that provide the sales agent with:

(1) The ability to sell more than 15% of the advertising time on a Top-Four Rated non-owned television station in the DMA; and

(2) An option or other ownership right that limits the licensee's ability to sell the JSA'd station; and

(3) The right to program more than 10% of the JSA'd television station's weekly hours, excluding local newscasts.

PCC submits that either approach – the 35% market standard or the "JSA Plus" standard – would better reflect the realities of television JSAs than the existing radio JSA attribution rule. Either approach would permit the continuation of television JSAs that further the public interest, while precluding only those that arguably may give rise to concerns over competition, diversity, or inappropriate influence.

The nature and scope of a television JSA attribution rule also must reflect the differences between radio and television with respect to the extent that existing television JSAs are grandfathered and transferable. PCC, its numerous JSA partners, and many other broadcasters entered into television JSAs after the Commission concluded that such arrangements did not raise concerns sufficient to justify attribution. These parties – and their stations' local viewers – should not be penalized by the Commission's evolving views of the television industry. Consequently, should the Commission choose to attribute television JSAs, it must provide broadcasters with the same grandfathering and transferability relief that it afforded to television broadcasters who faced a similar change in Commission policy when television local marketing agreements ("LMAs") became attributable in 1999.

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COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC"), by its attorneys, hereby submits its Comments on the Notice of Propose Rule Making (the "*Notice*") in this proceeding. As the owner and/or operator of 60 full-power television stations, and as a party to 43 joint sales agreements ("JSAs") covering 45 television stations, PCC offers the Commission a perspective that may be unparalleled among all commenters.

In its *Notice*, the Commission observed that it had "no reason to believe that the terms and conditions of TV JSAs differ substantively from those of radio JSAs."[1] From this premise, the Commission jumped inexplicably to the "tentative conclusion" that "JSAs have the same effect in local TV markets that they have in local radio markets and should be treated similarly."[2] Even assuming the terms of television JSAs and radio JSAs do not differ substantially, it simply does not follow that JSAs have the same effect on local television markets as they do in local radio markets. To the contrary, PCC's extensive experience with its JSAs confirms that the Commission's tentative conclusion cannot be applied to all or even a great majority of television JSAs. As demonstrated herein, television JSAs differ from radio JSAs in several material respects, and television JSAs simply do not affect local markets in a manner warranting attribution to the sales agents.

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1 *Notice*, at ¶ 2.

2 *Id*.

Introduction

PCC owns and operates one of the largest television station groups in America.[3] Directly and through its wholly owned subsidiaries, PCC owns and operates 57 television stations, and brokers three additional stations, all of which are affiliated with the PaxTV Network. Launched in August 1998, PaxTV is the nation's first and only broadcast network that airs exclusively family-friendly programming. The network provides viewers with a safe haven of over-the-air television programming for family viewing by delivering a unique blend of high-quality, family-oriented television programming free of the explicit sex, senseless violence and foul language found in so many television programs today. PaxTV broadcasts, among other things, a number of its own original programs, including dramatic series, movies, sports, and special events, many of which have earned awards and accolades for satisfying higher broadcast standards than most other programming available on television today.

Introducing PaxTV against the Big Four networks and other established English-language and Spanish-language broadcast networks necessitated, among other things, a significant amount of financing to acquire and produce programming attractive to viewers and advertisers. In addition to the time and financial investments needed for the start-up of a new network, PCC also faced the ongoing need to operate roughly five dozen television stations across the country as well as the obligation to plan and construct DTV facilities for these stations.

Throughout the first year of PaxTV's operation, PCC searched for a solution to these enormous competing financial demands. In August 1999, the Commission offered PCC a critical lifeline. In decisions adopted that month, the Commission put an end to years of uncertainty over its broadcast ownership and attribution rules by concluding an exhaustive multi-year

[3] All factual representations in these Comments, other than those for which the Commission can take official notice, are supported by the attached Declaration of William L. Watson.

examination of the radio and television industries. It determined that the evidence before it simply did not justify a finding that JSAs convey sufficient influence or control over a station's core operations to warrant attribution.[4] The Commission's conclusion then bears repeating today:

> We will not attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be attributed. We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, advertising, physical facilities, and other core operations of stations. We note that in our DTV Fifth Report and Order, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology. JSAs may be one such joint business arrangement. . . . Some JSAs may actually help promote diversity by enabling smaller stations to stay on the air.[5]

In good faith reliance on this determination, PCC began to enter into JSAs with established broadcasters in PCC's television station markets in the months following the Commission's August 1999 decision. In September 1999, PCC entered into a series of strategic agreements with NBC, including JSAs with NBC owned and operated television stations, that together provided further economic benefits and cost efficiencies. Today, PCC is party to 43 JSAs involving 43 full service television stations and two satellite stations, as identified in Table Two of Attachment One. Many, if not most, JSAs would not have been possible had the Commission determined in 1999 that television JSAs should be attributable to sales agents, because many of PCC's television markets would not have supported television duopolies.

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4 *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, ¶ 122 (1999) *("1999 Attribution Order"), recon. granted in part*, 16 FCC Rcd 1097 (2001).

5 *Id*. (footnotes omitted).

Under the JSAs, PCC pays the sales agents commissions in the form of revenue shares rather than a fixed fee. The portion of local advertising revenue that PCC receives after compensating the sales agent exceeds the net amount that PCC would have been able to obtain through its own efforts, because PCC, in contrast to the sales agents, does not possess decades worth of marketing expertise or sales contacts or sales support staff in the local markets. The Commission's treatment of JSAs has therefore allowed PCC's television stations to compete better in local markets, while also allowing PCC to invest more fully in operating its stations and creating a viable new television network that fosters additional competition and programming diversity at the national level.

I. JSAs Affect Local Television and Radio Markets Differently.

The Commission begins the *Notice* by observing that it has "no reason to believe that the terms and conditions of TV JSAs differ substantively from those of radio JSAs."[6] The Commission then incredibly leaps to "tentatively conclude that JSAs have the same effect in local TV markets that they have in local radio markets and should be treated similarly."[7] Even assuming the terms of television JSAs and radio JSAs do not differ substantially, it simply does not follow that JSAs have the same effect on local television markets as they do in local radio markets.

To the contrary, radio and television markets operate under very different economic models, and, as a result, JSAs affect radio and television markets differently. In the attached Declaration of Mark R. Fratrick, Ph.D., Vice President of BIA Financial Network explains that a local radio market has relatively fewer programming formats but relatively more broadcast outlets than the corresponding local television market.[8] Unlike radio, television broadcasters

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6 *Notice* at ¶ 2.

7 *Id*.

8 Declaration of Mark R. Fratrick, Ph.D. ("BIA Analysis").

face competition for consumers from literally hundreds of channels offered by cable and satellite operators, and television broadcasters face competition for local, regional, and national advertisements from these channels as well as cable and satellite operators.

As a result of these factors, a single or even a few broadcasters cannot dominate a group of viewers in the multi-channel video universe, unlike the situation in the radio universe. Dr. Fratrick therefore concludes that television JSAs are unlikely to produce anti-competitive effects in television markets. Even if the Commission ignores the multi-channel universe in which television broadcasters compete and examines only broadcast television stations, Dr. Fratrick submits that the majority of television JSAs do not raise concentration concerns because the JSA'd station typically attracts substantially lower ratings and revenues than their JSA partners.

To test this hypothesis, Dr. Fratrick calculated the Herfindahl-Hirschman Index ("HHI") of PCC JSAs and thirteen additional television JSAs identified through a search of recent media reports and FCC ownership reports.[9] In light of the fact that antitrust agencies typically use a 100-point threshold to determine whether a proposed merger warrants review, Dr. Fratrick's analysis confirms that television JSAs generally do not have noticeable effects on the level of competition in the applicable broadcast television market (*i.e.*, excluding the multi-channel competitors).[10]

In particular, Dr. Fratrick calculated that the combination of the thirteen non-PCC JSA'd stations with their respective JSA partner stations produced an average HHI increase of 125.8

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[9] The Commission has explained the HHI as follows: "The Department of Justice uses the HHI as part of its evaluation of market competition. They generally consider a market to be unconcentrated if the HHI is below 1000. HHIs are calculated by summing the square of each television owner's percentage of total television station revenues. The data for our estimate of the HHI comes from the BIA database which estimates station, owner, and market revenues. The revenue estimate combines national and local advertising revenue for each station, owner, and market." *See 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules, Notice of Inquiry*, 13 FCC Rcd 11276, ¶ 15, n. 21 (1998).

[10] *See* BIA Analysis.

points, which is only slightly above the threshold for review. This relatively low figure dwarfs the highest HHI increase from a combination of a JSA'd PCC station with its JSA partner station, which was 24 points. Overall, the combination of PCC JSA'd stations with their JSA partners' stations produced an average HHI increase of just 2.4 points!

The Commission therefore cannot reasonably conclude that all television JSAs raise competition concerns, even if the relevant market is defined as narrowly as possible by excluding broadcasters' multichannel competitors. Moreover, because the Commission cannot conclude that the 43 PCC JSAs adversely affect competition, it would be reversible error for the Commission to attribute the PCC JSAs on the basis of protecting competition.[11]

There can be no question that the economics of the local television and radio industries differ markedly. As such, it would be unreasonable for the Commission to conclude that JSAs have the same effect in local television markets that they have in local radio markets. Furthermore, PCC demonstrates below that not all television JSAs confer an improper degree of control or influence to the sales agents, while television JSAs can – and often do – contribute to competition and diversity in the local and national television markets. The facts, therefore, cannot support the wholesale application of the Commission's new radio JSA attribution policy to all television JSAs.

II. Not All Television JSAs Permit Sales Agents to Exercise Undue Control or Influence Over the JSA'd Stations.

The *Notice* explains that THE Commission attributed radio JSAs after determining that such agreements conferred on a sales agent the ability to induce a licensee to take actions to protect the sales agent's interests and created "a realistic potential . . . to affect a station's

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[11] *United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 8, 1997), at §1.51 (c) (transfers producing no increase in concentration are "unlikely to have adverse competitive consequences and ordinarily require no further analysis").

programming and other core operational decisions."[12] The *Notice* also identifies one television JSA that raised similar concerns.[13] The BIA analysis and PCC's experience with JSAs confirm that all television JSAs are not the same. The 43 PCC JSAs, for example, do not present incentives or opportunities for sales agents to obtain control or influence over PCC television stations or over any of PCC's core licensee functions.

The JSAs enable PCC to reduce station operating costs through the economies of scale, operating efficiencies, and elimination of redundant expenses that result from co-location of the JSA'd stations with those owned by the local JSA sales agents. Unlike the radio JSAs and the single television JSA summarized in the *Notice*, however, the PCC JSAs ensure that PCC retains clear control over the programming, personnel, finances, and sale of its television stations. PCC alone benefits or suffers economically with the fortunes of each JSA'd television station, as PCC's own revenues and income depend on the stations' ratings and local advertising revenues.

The JSAs involving PCC's television stations typically have ten-year terms with provisions for renewal. Under these JSAs, PCC sells all PaxTV Network advertising that its station broadcasts. PCC also retains *all* revenue from *all* sales on its JSA'd stations. Each JSA'd station's non-network time may be sold by PCC, a national sales representation firm, or the local sales agent. The JSAs designate the sales agent as the exclusive representative of a PCC television station with respect to the sale of local advertising time only. PCC reimburses the sales agent for the budgeted expenses it incurs in selling local time on the PCC station, including personnel costs. In addition, PCC pays the sales agent a commission that generally is a percentage of the revenue derived from the sale of non-network time by PCC, the station's

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[12] *Notice* at ¶ 8, *citing In the Matter of 2002 Biennial Regulatory Review,* 18 FCC Rcd 13620, ¶ 318 (2003) ("*2003 Media Ownership Order*"), *affirmed in part, remanded in part, Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004).

[13] *See Notice* at ¶ 13, *citing Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002).

national rep firm, and the station's sales agent. Either PCC or a sales agent may terminate a JSA if certain revenue targets are not met.

PCC owns or leases from third parties the transmitter, antenna, and related transmission system components used by its JSA'd stations; the sales agents do not own any of this equipment. With the limited exception of NBC's strategic investment in PCC, sales agents under PCC JSAs do not hold an option to purchase the JSA'd station or a right of first refusal over it, nor are the sales agents bound to finance or guarantee PCC's debt.

PCC remains ultimately responsible for all programming broadcast on its stations. Typically, sales agents have a limited right to broadcast or rebroadcast on the PCC television station certain local programming (*e.g.*, local newscasts, local sports, coverage of severe local weather conditions) to enhance PCC's stations' programming lineups. The programming rights, however, are subject to PCC's ultimate control and programming standards, as well as a fifteen percent cap. In addition, PCC alone decides (through the written consent of a PCC officer) when a PCC station may preempt network programming to broadcast alternative programming offered by a JSA sales agent.

In sum, the sales agents under the PCC JSAs lack influence or control such that they would (or could) effect PCC's programming decisions or its other core operating functions. Furthermore, because PCC *alone* participates in the upside and downside of its JSA'd stations' economic performances, the PCC JSAs do not "transfer[] all market risk from the licensee to the broker," as the Commission found in the JSA at issue in the *Ackerley* case.[14] To the contrary, **the PCC JSAs are the very antithesis of the *Ackerley* JSA because the sales agents of PCC stations do not assume any market risk**.

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14 *See id.*

Consequently, the same elements of potential control and influence that the Commission found so troublesome in radio JSAs and in the *Ackerley* television JSA cannot be assumed to infect all television JSAs, as those elements are nowhere present in the 43 JSAs to which PCC is a party. To the contrary, the PCC JSAs ensure that PCC participates actively in the management and programming of its stations, and they carefully avoid conferring on the sales agents any interests that would be significant enough to warrant attribution of PCC's stations.

III. Many Television JSAs, Including PCC's JSAs, Advance The Public Interest By Promoting Competition And Diversity.

As the FCC has long recognized, JSAs and other joint ventures serve the public interest and enable stations to pool resources and reduce operating expenses without threatening competition or diversity.[15] For television stations affiliated with new and emerging networks in particular, JSAs provide critical cost savings to enable them to funnel money into other areas to remain competitive, to generate viewing audiences, and to enjoy a greater ability to control operations and meet their DTV obligations.

The *Notice* asks whether "the unattributable nature of JSAs could lead to the exercise of market power by brokering stations and raise related competition concerns."[16] As explained above, the differences between the radio and television markets make it rather unlikely that television JSAs standing alone would raise competition concerns sufficient to warrant attribution. Indeed, the evidence simply does not support a sweeping indictment of all television JSAs, because the 43 PCC JSAs do not raise any competition concerns. As detailed in the attached BIA Analysis, combining the market shares of JSA'd PCC television stations with those of their

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15 *See, e.g., 1999 Attribution Order*, at ¶ 122; *Review of the Commission's Regulations Governing Television Broadcasting,* 14 FCC Rcd 12903, ¶ 133 (1999) ("*Local TV Order*"), *clarified*, 16 FCC Rcd 1067 (2001); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, ¶ 63 (1992) ("*Radio Order*"), *further recon. granted in part*, 9 FCC Rcd 7183 (1994) ("*Radio Recon. Order*").

16 *Notice* at ¶ 15.

sales agents lead to relatively small and wholly defensible increases in market concentration levels.[17] The BIA Analysis also confirms that the PCC JSAs produce market concentration levels that are relatively lower, on the whole, than certain other television JSAs that do not involve PCC.[18]

Rather than undermining competition and diversity, PCC's experiences illustrate well how television JSAs can further the public interest. By leasing some of its stations' advertising time to established local broadcasters and sharing the resulting revenues with these local sales experts, the PCC JSAs confer upon PCC a measure of the advantages that the established broadcasters already possess. These advantages take many forms and typically include the experience, expertise, research tools, marketing skills, and extensive contacts that the sales agents have developed in their local markets over the course of many decades. Local viewers and local marketplaces are the winners when the sales agents succeed in utilizing their enormous resources to market the local PCC television stations and PaxTV's family-friendly programming format to local advertisers in a multi-channel, highly competitive universe. Accordingly, the sale of local advertising time by PCC's sales agents fosters competition in their local television advertising markets.

The PCC JSAs also further programming diversity in local markets, which in turn spurs competition and diversity at the national level among all of the national broadcast and cable networks. By enabling PCC to realize cost efficiencies, the PCC JSAs enable PCC to provide more and better programming on its television stations. Indeed, JSAs are absolutely essential to PCC's business model. Without JSAs, PCC would have faced the high costs of operating dozens of television stations, constructing an equal number of digital television facilities, and launching a new broadcast network at the same time that its advertising revenues from its own local sales

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17 *See* BIA Analysis.

18 *Id.*

efforts would have reduced its ability to meet those obligations. Consequently, the cost efficiencies and economic benefits that flow from the PCC JSAs, in no small part, are responsible for PaxTV becoming a widely-recognized television network *in just six years* despite the highly competitive nature of the multi-channel universe. And during the same period, PCC has constructed dozens of new digital television stations as part of the transition to digital broadcasting. At this time, PCC is deploying the economic efficiencies derived from its JSAs into the development of no less than ten new original series that will all air in prime time during the 2004-2005 television season. As a result, PaxTV's current season will offer 14 original hours of programming per week that even parents and children can watch together – programming that would not be available in the marketplace were it not for the existing television JSAs, most of which would not survive attribution by the Commission.

Fostering the very existence of a new television network such as PaxTV, and in particular one that offers unique family-friendly programming, is itself monumental evidence that television JSAs may lead to greater competition and diversity. In addition to facilitating the very existence of the nation's seventh English-language broadcast network, the PCC JSAs have permitted the PCC television stations to expand competition and diversity among local program offerings as well. As the FCC recognizes in the *Notice*, JSAs can involve "a situation where a stronger station provides local news programming to a weaker station in the market as part of the agreements. This may enable such stations to provide news that they were not able to provide previously."[19] The Commission's observations has certainly been the case with PaxTV: several PCC television stations now broadcast local newscasts produced by their sales agents. For example, Gannett's WKYC, which serves as the sales agent for PCC's Akron, Ohio, television station in the Cleveland DMA, launched a new 6:30 p.m. newscast and, one year later, a new

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[19] *Notice*, at ¶ 17.

10:00 p.m. newscast; both programs focus on the Akron/Canton area of the DMA rather than Cleveland.

Other examples of additional local programming competition and diversity include the following:

- During Hurricanes Charlie, Frances, and Jean, the PCC television stations in the West Palm Beach, Tampa, Orlando, and Miami markets simulcast their JSA partners' wall-to-wall emergency weather coverage to provide the public with essential, life-saving information through power outages affecting viewers and threatening stations. In West Palm Beach, in fact, Adelphia lost its fiber connection to PCC's JSA partner, yet was able to receive that station's critical programming through its off-air reception of the PCC station.

- Prior to these hurricanes, the JSA sales agents in West Palm Beach, Tampa, Orlando, and Miami broadcast extensive pre-storm coverage, thereby preempting NBC network programming such as the Olympics, NASCAR, and Notre Dame Football. The JSA sales agents offered PCC, and PCC accepted, the opportunity to broadcast some of these preempted NBC network programs.

- JSA partners in the Chicago, Cleveland, San Antonio, Milwaukee, and Memphis markets committed to carrying local NFL preseason games for the 2004-05 season. Because some of these games conflicted with NBC's coverage of the Olympics, the sales agents offered these games to PCC. PCC elected to preempt PaxTV network and other programming on its stations in these markets and broadcast instead the football games. Judging by the ratings generated by the PCC stations' coverage of some of these games (especially those involving Green Bay and Cleveland) local football fans certainly appreciated PCC's ability to broadcast the games during the Olympics.

- The PCC station in Oklahoma City rebroadcasts the sixty-minute "Early Morning News" newscast as well as the sixty-minute "Noon News" newscast produced by its JSA partner, The New York Times. Likewise, PCC stations in the Minneapolis and Denver markets rebroadcast their JSA partners' sixty-minute late afternoon newscasts.

- PCC television stations in 26 markets broadcast or rebroadcast their JSA partners' thirty-minute early newscasts (*i.e.*, 6:30 or 7:00 p.m.), PCC television stations in 36 markets broadcast or rebroadcast their JSA partners' thirty-minute late newscasts (*i.e.*, 10:00 or 11:00 p.m.).

- From time to time, JSA sales agents offer PCC the opportunity to preempt regularly scheduled programming on the JSA'd station to air coverage of local breaking news that they produce and prime time NBC entertainment programming that their station cannot broadcast due to a schedule conflict. PCC accepts many of these offers – but, due to content concerns, it also declines some.

The Commission has often observed that JSAs and other joint venture arrangements can serve the public interest by enabling stations to pool resources and reduce operating expenses.[20] The PCC JSAs confirm the Commission's prior determinations, because these agreements enable PCC to convert established broadcasters' local sales and marketing expertise into additional competition and programming diversity in local and national television markets, all without harm to the local marketplace.

IV. Should the Commission Choose to Attribute Television JSAs, It Must Select a More Reasonable Threshold than a One-Size-Fits-All 15% Standard.

The Commission's June 2003 media ownership order completed a thorough review of the costs and benefits of evaluating broadcast transactions through a case-by-case analysis or bright line rules.[21] That review led the Commission to conclude that "the adoption of bright line rules, on balance, continues to play a valuable role in implementing the Commission's goals." Recognizing that the public and industry may be harmed when bright line rules prove to be over-inclusive or under-inclusive,[22] the Commission "decided to retain our existing framework of *targeted, outlet-specific*, multiple ownership rules, that cover the various media and perceived areas of potential competition and diversity concerns rather than adopting a single rule to cover all media."[23]

In this regard, the Commission merely affirmed its practice of applying targeted, outlet-specific ownership restrictions since it first began regulating broadcast ownership over six decades ago. Multiple ownership rules allow, for example, a combination of five radio stations in a market with at least 14 commercial and noncommercial radio stations, but only two

20 *See supra* note 12.

21 *2003 Media Ownership Order*, at ¶¶ 80, 84, 85.

22 *Notice*, at ¶ 84.

23 *Id.*, at ¶ 80.

television stations regardless of the number of television stations in the market.[24] The Commission exempts from attribution television stations that serve as "satellites" of other in-market television stations, but not radio stations functioning in the same manner.[25] The Commission restricts the audience reach of television stations nationally, yet it has no comparable rule for radio stations.[26] Cross-ownership rules are triggered at different points based on whether the broadcast station at issue operates in the AM, FM, or television service. The ownership attribution rules for the national television cap apply differently to VHF television stations and UHF television stations.[27]

The Commission in this proceeding cannot reasonably ignore the very different technologies and economics of the radio and television services, nor may it close its eyes to the different ways that JSAs effect the radio and television markets. Instead, in keeping with its historic practice and recognized duty to apply targeted, outlet-specific ownership rules, the Commission in this proceeding must fashion an attribution policy for television JSAs driven by facts, even if administratively it would be easiest to simply fasten the new radio JSA attribution policy onto television JSAs.

The Commission must also keep in mind the folly of simply applying a one-size-fits-all "solution" to the concerns found in a single television JSA. If it attributes television JSAs based on a strict formula that looks only at 15% of a station's advertising time, broadcasters will simply have to search for other ways to achieve the cost efficiencies of television JSAs without violating that test. For example, a licensee that already reimburses a sales agent for the personnel costs of its sales staff could simply employ that staff directly and obtain the sales

24 47 C.F.R. §§ 73.3555(a) and (b)(2)(ii). The Commission's local radio limits further reflect distinctions between the AM and FM services.

25 *See id.*, Note 5.

26 47 C.F.R. § 73.3555(e)(1).

27 47 C.F.R. § 73.3555(e)(2)(i).

agent's expertise through a management consultancy or independent contractor arrangement. This alternative arrangement would not cross the proposed 15% threshold for attribution, yet it would be functionally the same as a JSA. Attributing television JSAs in many cases may simply force parties to spend scarce resources to end up in the same place while still avoiding FCC attribution.

If the Commission elects to attribute television JSAs, it must be careful to adopt a targeted, outlet-specific rule reflecting the differences between radio and television markets and attacking only the influences and opportunities that the Commission intends to prohibit. In lieu of the one-size-fits-all approach proposed in the *Notice*, PCC proposes that the Commission consider one of two alternatives.

- **Attribute only those television JSAs where the sales agent would be selling more than 35% of all broadcast television advertising time in its DMA.** Such a rule would target television JSAs that confer the right to control a sizeable portion of local television advertising inventory and therefore may have the potential to lessen competition in the market. Importantly, this rule would have no effect on the vast majority of JSAs that, like PCC's JSAs, do not pose any threat to competition or diversity.

- **Attribute only those television JSAs that provide the sales agent with:**

  (1) The ability to sell more than 15% of the advertising time on a Top-Four Rated non-owned television station in the DMA, and

  (2) An option or other right that limits the licensee's ability to sell the JSA'd station; and

  (3) The right to program more than 10% of the JSA'd television station's weekly hours, excluding local newscasts.

  This "JSA-Plus" standard would recognize and encourage JSAs that benefit the public interest by increasing competition, diversity, and the provision of local news. This standard also carefully ensures that the JSA does not confer a degree of influence or control over the JSA'd station sufficient to create a realistic potential to affect the programming decisions of licensees or other core operating functions.

PCC's experience with its 43 television JSAs confirms that television JSAs do not affect local television markets in the same manner as radio JSAs. Indeed, PCC's experience teaches that the public benefits from its arrangements with established local broadcasters through increased competition and programming diversity at both the local and national levels. Indeed, the PCC JSAs produce such enormous efficiencies that it would be impossible to overstate their role in ensuring the financial viability of PCC and PaxTV.

A carefully targeting attributable rule must reflect these realities. The Commission's tentative conclusion that a one-size-fits-all rule from the radio context should be applied to every television JSA cannot be justified. Should the Commission elect to attribute television JSAs, it must consider the adverse effects that such a decision would produce and accordingly adopt only a rule that targets the harms it perceives. Either a 35% market standard or the JSA Plus approach would satisfy all of these critical considerations.

V. If the Commission Attributes Television JSAs, It Must Recognize the Differences Between Radio and Television in Crafting Appropriate Grandfathering and Transferability Provisions.

As demonstrated above, no basis exists for attribution of television JSAs. Should the Commission nevertheless elect to take such action, all television JSAs entered into prior to August 2, 2004, the release date of the *Notice*, should receive the same treatment that the Commission afforded to television LMAs that became attributable as a result of the Commission's August 1999 ownership attribution order.[28] In particular, television JSAs must be grandfathered for a period of five years from the adoption of the Report and Order in this proceeding, and they should be freely renewable and transferable during that period. During the next periodic review of broadcast ownership rules, the Commission should conduct a case-by-case review of the grandfathered pre-August 2, 2004 television JSAs and determine the

[28] *1999 Attribution Order*, at ¶¶ 168-173; *Local TV Order*, at ¶¶ 133-148.

appropriate course to take at that time. Such treatment not only would be consistent with precedent, it also represents the most equitable approach to the difficult problem of changing a fixed regulatory policy after numerous parties relied on the Commission's prior determinations.

A decision not to grandfather existing television JSAs would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and *future* effect designed to implement, interpret, or prescribe law or policy[29]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[30] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties. The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"[31] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[32]

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements: (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would

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29 5 U.S.C. § 551(4) (emphasis added).

30 *See, e.g., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App. 1980).

31 *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

32 *Cf. Amendments of Parts 20 and 24 of the Commission's Rules*, 11 FCC Rcd 7824, 7887 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.[33] Any decision by the Commission not to grandfather existing television JSAs cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions.[34] A failure to grandfather existing television JSAs would be a radical and unjustified departure from this longstanding practice.

Further, entities that entered into television JSAs prior to the Commission's proposed attribution of such agreements relied completely on the lack of Commission regulation of such arrangements. Parties to JSAs reasonably structured their business arrangements (including contractual provisions governing renewal and assignment) and arranged financing and made other commitments based on the absence of Commission regulation. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive

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33 *See, e.g., Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 11 FCC Rcd 2461, 2464 & n.42 (1995).

34 *See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations,* First Report and Order, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 50 FCC 2d 1046, 1074 (1975) (subsequent history omitted) (grandfathering broadcast-newspaper cross-ownership); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd, Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard,* 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard,* 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations*, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions).

regulation.[35] Here, it would be grossly inequitable for the Commission to require disruption of established business relationships entered into in reliance on an existing regulatory regime.

Retroactive television JSA regulation by denying renewability and transferability also would impose significant burdens contrary to the public interest. The JSA'd station may not be able to survive without the benefits associated with the JSA, and stations that did not anticipate the need to assume full responsibility for advertising time may be hard-pressed to make alternative plans. Station operational plans were made based upon certain business assumptions, specifically including the renewability of the underlying business arrangements. Failure to respect agreements entered into in an absence of Commission regulations by prohibiting their renewal or transfer may adversely impact these stations' economic survival and, in turn, their service to the public. Retroactive application of any new television JSA attribution standards will, in short, burden both the public and affected private parties.

Nor does any statutory interest or congressional mandate require the Commission to adopt its proposed television JSA attribution rule retroactively. Federal agencies such as the Commission are precluded from issuing a rule that has a retroactive effect unless Congress has explicitly conferred the power to do so.[36] Here, Congress has failed to give the Commission the power to retroactively apply any attribution rules for television JSAs.

A failure to grant grandfathering relief to existing television JSAs by allowing full implementation of all negotiated terms also would be inequitable in the extreme. Broadcasters large and small have made substantial financial, personnel, and other commitments in explicit and good faith reliance on the Commission's regulatory scheme; the Commission must not penalize their success by requiring such arrangements' premature termination. Moreover,

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[35] *See, e.g.*, *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960).

[36] *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

disruption of existing television JSAs would disserve the public interest by lessening competition and diversity in the television marketplace.

In the face of changes to its attribution rules, the Commission in the past has afforded grandfathering relief to existing joint ventures that caused licensees to exceed relevant ownership limits. For example, when the Commission decided to attribute radio LMAs in 1992, it grandfathered existing radio LMAs until the expiration of the LMA's initial term.[37]

Likewise, when the Commission changed its attribution rules to apply to television LMAs in 1999, it grandfathered television LMAs entered into prior to the November 5, 1996 adoption date of the relevant Notice of Proposed Rulemaking until the Commission's 2004 biennial review, a period of approximately five years.[38] At that time, the Commission would conduct a case-by-case review of grandfathered television LMAs to determine whether to grandfather those arrangements permanently.[39] Both temporarily and permanently grandfathered television LMAs may be renewed and/or transferred to third parties prior to the completion of the case-by-case review.[40] The Commission determined the pre-November 5, 1996 LMAs deserved "significant grandfathering relief" due to the "strong equities" against requiring divestiture of agreements entered into when there was no Commission prohibition against them and upsetting the parties' settled expectations,[41] as well as the public interest benefits from a number of television LMAs which the Commission did not want to disrupt.[42] In addition, the Commission grandfathered for two years those television LMAs entered into on or after the

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37 *Radio Order*, at ¶ 66; *Radio Recon. Order*, at ¶ 59.

38 *Local TV Order*, at ¶ 133. In the *Notice* in this proceeding, the Commission asks whether the reevaluation of grandfathered pre-November 1996 television LMAs should be postponed until the quadrennial ownership review in 2006. *See Notice* at ¶ 21.

39 *Local TV Order*, at ¶¶ 133, 146-148.

40 *Id*. at ¶ 146.

41 *Id.* at ¶ 144.

42 *Id.* at ¶ 145.

adoption date of the applicable Notice of Proposed Rule Making that did not comply with the Commission's revised ownership rules in order to "avoid undue disruption of existing arrangements and. . . allow the holders of LMAs to order their affairs."[43]

The rationale for the Commission's grandfathering policies for television LMAs supports similar grandfathering relief for existing television JSAs in the event the Commission attributes television JSAs. As the Commission determined in the case of pre-November 5, 1996 television LMAs, "strong equities" militate against requiring termination of pre-August 2, 2004 television JSAs. Like the parties to pre-November 5, 1996 television LMAs, parties to pre-August 2, 2004 television JSAs entered into those arrangements when no Commission rule or policy prohibited them. Accordingly, requiring divesture of those interests and premature termination of their settled expectations established by these plans and investments would impose an unfair hardship on these parties.

Finally, like television LMAs, television JSAs have produced substantial public interest benefits. As described above, PCC's television JSAs promote competition and diversity, and they enable PCC to operate its television stations and prepare for the DTV transition. Forced divestiture of the PCC JSAs would result in disruption of the substantial, tangible public interest benefits of these arrangements. Forced divesture also would adversely impact PCC as a whole, seriously hampering its ability to compete in the network business and expand on its aggressive offerings of original programming. Accordingly, the Commission must extend to existing television JSAs grandfathering relief similar to that afforded to existing television LMAs when the Commission decided to attribute them.

Failure to grandfather existing television JSAs would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only

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[43] *Id.* at ¶ 142.

would such action disserve the judicially-recognized legitimate government objective of protecting such interests, it also would deprive the public of the significant, tangible public interest benefits of television JSAs.

CONCLUSION

The Commission's ownership rules have long reflected the undeniable differences between radio and television, and, indeed, even differences among different classes within the AM, FM, and television services. In this proceeding, commenters with experience operating television stations will demonstrate conclusively that the differences in the radio and television marketplaces produce very different results from JSAs. Indeed, PCC's 43 television JSAs alone benefit the public interest in the form of increased competition and program diversity. In light of these realities, it would be arbitrary and capricious, as well as harmful to the public interest, for the Commission to apply a blanket rule attributing all television JSAs, including those that, like the PCC JSAs, ensure that the licensee contains complete control over its station.

If the Commission nevertheless elects to attribute television JSAs, it must be careful to adopt a targeted, outlet-specific rule reflecting the differences between radio and television. PCC proposes two carefully crafted alternatives that better reflect the concerns expressed in the *Notice* than the blunt, one-size-fits-all approach proposed in the *Notice*. In addition, should the Commission choose to attribute television JSAs, it must ensure that existing television JSAs receive grandfathering and transferability protections equivalent to television LMAs when they fell under the regulatory anvil after years of acceptance.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

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October 27, 2004

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MB Docket No. 04-256
Attribution of Joint Sales Agreements	)	
In Local Television Markets	)	

To: The Secretary

DECLARATION OF WILLIAM L. WATSON

I am William L. Watson and I serve as the Assistant Secretary of Paxson Communications Corporation.

I have reviewed the foregoing Comments in the above-referenced proceeding. The factual matters stated therein, other than those assertions of which the Federal Communications Commission may take official notice and those that are otherwise supported therein, are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

By: William L. Watson
William L. Watson

October 27, 2004

ATTRIBUTING JOINT SALES AGREEMENTS:

A REPORT FOR

PAXSON COMMUNICATIONS CORPORATION

Mark R. Fratrik, Ph.D.
Vice President, BIA Financial Network

October 27, 2004

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Introduction

The local television industry has undergone monumental changes in recent years, the most significant of which is the tremendous increase in the number of video choices available to the consumer. The expansion of those choices has resulted from the increased reach (penetration) of providers of multiple video channels (e.g., cable, DBS, etc.), their increased channel offers, the successful introduction of consumer products and services that expand viewing options (e.g., personal video recorders and new cable networks), and finally the ability to deliver video programming via the Internet. All of these factors affect the competitive environment facing all television stations, including those owned by Paxson Communications Corporation (PCC).

Within this environment, PCC stations must compete with other local over-the-air television stations as well as cable and DBS operators to generate advertising revenues. Given the competitive threats caused by the choices now available, the competition among local broadcasters is fierce. PCC stations, struggling to attract even the smallest measurable audiences, find it increasingly more difficult to compete in these marketplaces. In an effort to obtain operational efficiencies and improve its ability to operate its stations and acquire and produce popular programming, PCC entered into joint sales agreements (JSAs) with other local television stations in many of its markets.

The Federal Communications Commission (FCC) has proposed attributing JSAs of television stations, as it recently did for JSAs of radio stations. Such a change would prevent PCC from continuing many of these JSAs. Without JSAs, PCC stations will suffer economically, as will the communities that these stations serve.

The FCC premised its proposal to attribute television JSAs on the similarities between the local radio and television markets. In fact, fundamental differences exist between the local radio and television marketplaces that undercut the FCC's proposal. Moreover, we demonstrate herein that not all television JSAs raise competition concerns.

Television Stations Compete in a Multi-Channel Marketplace

Multi-Channel Video Marketplace

The growing acceptance of multi-channel video program distributors (MVPDs) is the single most important development affecting the long-term viability of local television stations. The choices now available and the many more that will be available in the future[1] thus highlight one of the key differences when comparing local radio and television markets. While many radio markets contain a number of broadcast stations, the television market's vast number of viewing options available now and in the immediate future dwarfs the number of listening options available in the radio marketplace.

1 Internet streaming of video programming also has a promising future, greatly expanding the choices available and the competition facing local television broadcasters. Furthermore, many local television stations are already multicasting on their digital facilities and others are considering starting, providing even more choices to local viewers in the future.

As required by the 1992 Cable Act, the FCC documents the increased choices available in the video marketplace through an annual assessment of the status of competition in the market for the delivery of video programming. According to the FCC, the total number of MVPD subscribers increased by 56% between December 1993 and June 2003. At year-end 1993, 60.3 million households (64.0% of television households) subscribed to MVPD services (primarily cable). By June 2003, this figure increased to 94.2 million households (88.3% of television households). Television households increased 13.2% in this time frame, from 94.2 million to 106.6 million. Thus, MVPD subscribership increased in both absolute and relative measures over the past ten years.

Table 1 Number of MVPD Subscribers: 1993-2003

MVPD	Dec-93	Jun-98	Jun-01	Jun-02	Jun-03
Cable	57,200,000	65,400,000	68,500,000	68,800,000	70,490,000
MMDS	397,000	1,000,000	700,000	490,000	200,000
SMATV	1,004,000	940,000	1,500,000	1,600,000	1,200,000
HSD	1,612,000	2,028,200	1,000,074	700,641	502,191
DBS	70,000	7,200,000	16,070,000	18,240,000	20,360,000
OVS	0	66,000	60,000	60,000	60,000
BSP	0	0	0	0	1,400,000
Total	***60,283,000***	***76,634,200***	***87,830,074***	***89,890,641***	***94,212,191***

Source: Federal Communications Commission (Jan 2004)

In addition to gaining more subscribers, the two leading MVPDs – cable and DBS – have each been expanding their channel capacities and transitioning to digital services. In fact, the leading satellite services already offer 100% digital signals. Cable has invested heavily to catch up to satellite by expanding bandwidth capacity and by rolling out digital services including HDTV.

Most cable subscribers are served by systems with a channel capacity of at least 90 television channels. To remain competitive with satellite services, cable systems increased their channel capacity and launched other digital services. Currently, there are about 23 million digital cable subscribers, growing 400% in just four years.[2]

At the same time, over 200 video channels are available from the DBS services. And as shown earlier, DBS services have experienced incredible growth in recent years, growing by 183% in just the last five years alone.

PCC's Place in this Multi-Channel Marketplace

In August 1998, PCC started PaxTV, a new over-the-air television network with a different genre of programming, family oriented programming. Most of the affiliates of this network are television stations owned and operated by PCC. Faced with increased competition from the hundreds of viewing options delivered by cable and DBS and from the local ad sales efforts of cable operators, as well as the downturn in the national economy and the television advertising marketplace, PCC stations confronted multiple challenges – before even considering the costs of transitioning to digital television.

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[2] Source: Kagan Research (http://www.ncta.com/Docs/PageContent.cfm?pageID=314)

In order to overcome these challenges, PCC entered into JSAs with other local over-the-air television stations. These arrangements allow the PCC stations to take advantage of sales efforts efficiencies while still retaining the operational responsibilities of its stations. Sustaining these stations produces the public interest benefit of providing a base for the PaxTV Network as a whole to survive. In other words, by allowing PCC stations to achieve operating efficiencies, the JSAs allowed PCC to develop the PaxTV Network, and they allowed PaxTV to broadcast over a large enough number of local outlets in many important markets to sustain itself as the seventh national English-language broadcast network in a highly competitive, multichannel universe. It is not an exaggeration to say that without sustaining its local outlets, the PaxTV Network would have found it difficult, if not impossible, to survive. Consequently, the PCC JSAs have expanded diversity of programming, especially to households not subscribing to cable or satellite services.

Differences Between Radio and Television Markets

While the FCC now attributes JSAs in the radio industry, significant competitive and regulatory differences in the local markets of radio and television warrant different treatment of television JSAs.

Relative Choices Available in Two Media Markets

The vastly differing number of choices available to the local listener and the local viewer is just one difference between the television and radio marketplaces. To begin with, many radio markets have a number of stations offering different formats. Yet, none of the 287 Arbitron radio metros, and certainly none of the other unsurveyed areas, have the same breadth of programming choices available in even the smallest television market. In fact, the average number of radio stations (commercial and non-commercial) in Arbitron metro markets is 29.4. In contrast, local cable systems (increasingly digital in delivery) and DBS (available in all parts of the country) offer hundreds of viewing options for the consumer.

Television markets, unlike radio markets, are therefore characterized by a relatively greater amount of competition for ratings due to the hundreds of channels (viewing options). In addition, these channels, along with MVPDs, compete against broadcasters for advertising dollars.

Relative Lack of Concentration Caused by Television JSAs

The impact of the vast differences in the number of choices available in local television markets as compared to local radio markets can be clearly seen by examining the audience shares of the stations that are parties to JSAs. Using the most commonly used measure of concentration, the Herfindahl-Hirschmann Index (HHI), I calculated concentration levels of the total day audience share (9 AM – midnight) of the brokered stations and sales agent stations of the 43 PCC JSAs (Table Two), plus 13 JSAs identified in media reports and elsewhere (Table Three).[3]

[3] We used the total day (9 AM – midnight) household share for the May 2004 sweeps period for this concentration calculation.

Table 2 – Audience Shares of PCC and JSA Partner Station				
	PCC Station		Partner Station	
Market	**Calls**	**Aud. Share**	**Calls**	**Aud. Share**
New York, NY	WPXN	0	WNBC	10
Los Angeles, CA	KPXN	0	KNBC	8
Chicago, IL	WCPX	0	WMAQ	10
Philadelphia, PA	WPPX	0	WCAU	10
San Francisco-Oakland-San Jose, CA	KKPX	0	KNTV	8
Dallas-Ft. Worth, TX	KPXD	0	KXAS	10
Washington, DC	WPXW	0	WRC	10
Atlanta, GA	WPXA	0	WXIA	8
Houston, TX	KPXB	0	KHOU	11
Seattle-Tacoma, WA	KWPX	0	KING	15
Tampa-St Petersburg-Sarasota, FL	WXPX	0	WFLA	11
Minneapolis - St. Paul, MN	KPXM	0	KARE	14
Phoenix, AZ	KPPX	0	KPNX	9
Cleveland-Akron, OH	WVPX	0	WKYC	13
Miami - Ft. Lauderdale, FL	WPXM	0	WTVJ	6
Denver, CO	KPXC	0	KUSA	12
Sacramento-Stockton-Modesto, CA	KSPX	0	KCRA	12
Orlando-Daytona Beach-Melbourne, FL	WOPX	0	WESH	11
Portland, OR	KPXG	0	KGW	12
Indianapolis, IN	WIPX	0	WTHR	15
Hartford-New Haven, CT	WHPX	0	WVIT	10
Raleigh-Durham, NC	WRPX	0	WNCN	7
Kansas City, KS-MO	KPXE	0	KSHB	8
Milwaukee, WI	WPXE	0	WTMJ	14
San Antonio, TX	KPXL	1	WOAI	11
Grand Rapids-Kalamazoo-Battle Creek, MI	WZPX	0	WOOD	14
West Palm Beach-Ft. Pierce, FL	WPXP	0	WPTV	15
Birmingham, AL	WPXH	1	WVTM	10
Norfolk-Portsmouth-Newport News, VA	WPXV	0	WAVY	11
New Orleans, LA	WPXL	0	WDSU	10
Memphis, TN	WPXX	1	WMC	12
Buffalo, NY	WPXJ	0	WGRZ	11
Oklahoma City, OK	KOPX	0	KFOR	15
Greensboro-High Point-Winston Salem, NC	WGPX	1	WXII	11
Providence, RI-New Bedford, MA	WPXQ	0	WJAR	16
Jacksonville, FL	WPXC	0	WJXT	8
Wilkes Barre-Scranton, PA	WQPX	0	WNEP	16
Tulsa, OK	KTPX	0	KJRH	8
Knoxville, TN	WPXK	2	WTNZ	4
Roanoke-Lynchburg, VA	WPXR	0	WSLS	12
Des Moines-Ames, IA	KFPX	0	WHO	17
Syracuse, NY	WSPX	0	WSTM	14
Spokane, WA	KGPX	0	KHQ	13

Table 3 – Audience Shares of Select JSA Brokered and JSA Partner Station				
	Brokered Station		JSA Partner Station	
Market	Calls	Aud. Share	Calls	Aud. Share
Anchorage, AK	KTBY	4	KTVA	13
Billings, MT	KHMT	3	KSVI	5
Baton Rouge, LA	WVLA	12	KGMB	6
Duluth-Superior, MN	KDLH	2	KBJR	18
Lansing, MI	WHTV	8	WLAJ	5
Lubbock, TX	KAMC	5	KLBK	11
Monroe, LA – El Dorado, AR	KARD	4	KTVE	11
Monterey-Salinas, CA	KCBA	15	KION	8
Peoria, IL-Bloomington, IN	WYZZ	5	WMBD	16
Springfield, MO	KOLR	4	KDEB	6
Tallahassee, FL	WTXL	3	WTWC	6
Terre Haute, IN	WBAK	9	WTWO	14
Wichita Falls, TX	KJTL	5	KFDX	16

Antitrust agencies typically use a 100-point threshold to examine a proposed merger's anti-competitive potential. The combination of the brokered stations with the JSA partner stations in non-PCC JSAs produced an average HHI increase of 125.8. The combination of brokered PCC station with the JSA partner stations in PCC JSAs yielded an average HHI increase of just 2.4. Thus, it is clear that not all JSAs raise anti-competitive concerns within broadcast-only local television markets. Moreover, in none of the PCC JSA markets would an outright combination of the PCC station with its JSA partner's station result in a meaningful increase in consolidation. In fact, no PCC JSA market increased by more than 24 points, which is a mere fraction of the 100-point threshold used by the antitrust agencies. As such, the FCC cannot conclude that all television JSAs raise anticompetitive concerns, as the 43 PCC JSAs, at the very least, produce merely negligible increases in consolidation.

Ability to Combine in Radio Markets

Local radio stations can be owned and controlled to an extent that one company can own as many as eight radio stations when there are at least 45 local radio stations in the market. Even in the smallest markets, radio groups have been allowed to own just below 50% of the local radio stations.[4] The ability to operate at a more efficient local scale has strengthened local radio stations and enhanced their ability to serve their local communities.

In contrast, local television stations are relatively constrained in their ability to combine, especially in mid-size and smaller markets. Under the FCC's current ownership rules, two television stations may combine only when at least eight independent voices in the local television marketplace would remain post-merger. Thus, in the larger television markets, one party can own at most 22.2% (i.e., 2 out of 9 stations) of the total number of local broadcast television stations. In many television markets, however, little or no opportunity exists for broadcasters to realize any efficiencies without either violating the FCC's rules or employing a JSA.

Other Differences

Finally, another crucial difference between the radio and television markets lies in the ability of underperforming local radio and television stations to improve their performances. Radio stations may quickly change programming formats to react to market pressures and otherwise to increase their ability to compete. Radio stations are constantly researching steps to increase their local audiences, primarily through programming changes,

[4] In markets where there are 13 radio stations, one company could own 6 of those stations, that is, 46.2% of the stations in that market.

but also through possible upgrades to their technical facilities (e.g., increasing tower height and/or power, changing the location of the antenna, etc.). With the necessary investment funds, radio stations typically have the ability to quickly change their ability to compete and better serve their local communities.

In contrast, local television stations face much greater difficulties in turning around poor performances. First, there are greater difficulties in improving their technical facilities in general, and especially during the digital television transition period. Second, there are institutional, market-based barriers for local television stations to improve their programming quickly. Contracts for the most popular television programming typically span many years and are negotiated years in advance. Third, many program suppliers, syndicators, will not want to sell their programming to underperforming local television station. Because syndicators typically sell a portion of the advertising within their programs, the have a market-based incentive to sell their programming to stations best able to deliver audiences for their programming, and thus their advertisers.[5] Consequently, it is extremely difficult for underperforming local television stations to improve their performance in a relatively short time period. Hence, there should little concern when a poor performing television station "teams up" with a stronger local television station.[6]

[5] Additionally, a syndicator's ability to sell its programs for the next contract period is determined, in part, on the audience shares generated in the most recent airing of its programs. Therefore, syndicators are very concerned with the ability of the local television stations to attract the largest audiences possible for their programs.

[6] This inability to improve their performance quickly highlights one of the efficiencies that could occur with common ownership. Many times, the owner of two local television stations has already purchased quality programming that "does not fit" with the stronger station and places it on the weaker station.

Not All JSAs Raise Competition Concerns

There should be little, if any, concern about the impact that JSAs have in local television markets. Competition for viewers is fierce, the change in concentration levels are typically very small, and local television stations have little ability under present common ownership rules to utilize the efficiencies that many need to survive. These and the other factors identified above prevent a single or even a few broadcasters from dominating a group of viewers in the multi-channel video universe. For these reasons, television JSAs are unlikely to produce adverse effects on the competitiveness of the local television market and the delivery of video programming in local markets, especially those with the PCC stations.

Nevertheless, should the FCC decide to attribute television JSAs, it should distinguish the cases with no negative effects on local markets. In the case of the PCC JSAs, as shown in Table 2, the combination of audience share from the brokered and sales agent stations do not have negative impacts on local markets. The PCC stations, while providing a different genre of programming, have not been successful enough in generating audiences to have a meaningful position in the local television markets such that the JSA alter the markets' level of concentration. This lack of impact is clearly seen with the insignificant changes in the HHIs that result from combining these stations.

Other JSAs involve more significant local television stations in terms of audience share. These stations are typically in the mid-sized and smaller markets, where stations struggle to survive in the increasingly competitive video marketplace. For example, in the Peoria-Bloomington television market (rank 117) one station with a 16 total day household audience share is party to a JSA with a station that has a 4 total day audience share.[7] Another example is in the Monroe, LA – El Dorado, AR television market (rank 135), where one station with an 11 total day household audience share is party to a JSA with another local station that has a 5 total day household audience share.[8] In both cases, the lower ranked station most likely finds it very difficult to compete even with their not insignificant audience shares given their markets' relatively small size. In any event, combinations of these stations would pose more significant competition concerns than any situation involving one of the 43 PCC JSAs.

Conclusion

Concern about too much control over local radio and television stations have long been an important role for the FCC. The FCC must recognize, however, that the different dynamics of the local television market relative to the local radio market lessen the anticompetitive effects of television JSAs. In fact, as demonstrated herein, television JSAs are unlikely to produce adverse effects on the competitiveness of the local television market and the delivery of video programming in local markets, especially those with the PCC stations. To the contrary, the PCC JSAs allow operational efficiencies that permit the PCC stations to survive, which in turn furthers local competition and increases diversity in programming.

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7 The stations are WMBD and WYZZ, respectively.

8 The stations are KTVE and KARD, respectively.